

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
)	
Federal-State Joint Board on Universal Service	)	CC Docket 96-45
)	
Lifeline and Link Up	)	WC Docket No. 03-109
)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
)	
Numbering Resource Optimization	)	CC Docket No. 99-200
)	
Implementation of the Local Competition)	
Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
)	
Developing a Unified Inter-carrier Compensation)	
Regime	)	CC Docket No. 01-92
)	
Inter-carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
)	
IP-Enabled Services	)	WC Docket No. 04-36

Comments of the National Tribal Telecommunications Association

I. Introduction

The National Tribal Telecommunications Association (“NTTA”) hereby submits these comments in response to the Order on Remand and Report and Order and Further Notice of Proposed Rulemaking (“FNPRM”) captioned above. NTTA is a national trade association representing tribally owned telecommunications companies and their customers. NTTA members serve and are a part of their respective tribal communities. These comments address the concerns of NTTA.

The FNPRM addresses many issues at the forefront for telecommunications companies and the communities they serve. The Commission outlines broad potential reforms to the federal universal service support fund (“FUSF”) via three draft orders (collectively, “Draft Orders”), each of which has prospects to dramatically shift this country’s Universal Service policy. As both Eligible Telecommunications Carriers (“ETCs”) and Providers of Last Resort (“POLRs”), NTTA members understand the economic and political pressures currently building on the FUSF and applaud the Commission’s continuing intent to relieve these pressures. However, as it did in April of this year,¹ NTTA again urges the Commission to ensure that the original goals of universal service policy are fulfilled for *all* areas of the country prior to pursuing additional goals. Further, as the FNPRM illustrates, the Commission needs to implement its adopted Trust Policy for a government-to-government relationship with tribal governments to ensure that tribal governments have parity of consultation with other governing authorities.

II. Analysis of the FNPRM from a Tribal perspective.

The FNPRM addresses outstanding intercarrier compensation issues and proposed Universal Service rule changes. With regard to the Universal Service rules, the Commission seeks to control the growing demand on the FUSF by incumbent and competitive carriers. Using several devices, the Commission attempts to cap the growth of the FUSF, limit which carriers might receive high-cost support, define efficient allocation of support, and extend Universal Service funding to broadband deployment by tying continued high-cost support to full broadband Internet access deployment.

¹ NTTA has attached herein its previously filed comments as Attachment A.

NTTA not only represents the eight tribal communities that have established their own telecommunications services, but also the interests of 555 other tribal communities that have not been able to provision their own services. As a collective community, the tribal communities are the worst-served in the United States, with an average service rate thirty to thirty-five percent below non-tribal communities.

Due to the reasons described above as well as previously presented to the Commission,² NTTA is concerned that the proposed Universal Service rules represent a glass that is half-empty. As opposed to insuring that the communities with the least in way of services are first in line under the new Universal Service rules, the vast majority of the proposed rules will only cover the communities with the most – the most providers, the most infrastructure and the highest telephone penetration rates.

Efforts to reform Universal Service in this FNPRM are focused on markets where there are multiple carriers vying for a single customer.³ There is little that addresses the critical needs of tribal communities or communities where there is a single provider that may *not* be serving the entire service area.

NTTA notes that the Commission proposes targeting and defining “Unserved” areas for broadband services, but not for infrastructure services. The Communications Act of 1934 (the

² See Attachment A, pp. 2-3.

³ See, for example, FNPRM Appendix A, para. 2 (“Competition in local telephone markets has thrived.”) and FNPRM Appendix C, para. 2 (“Competition in local telephone markets has thrived.”).

“Communications Act”) requires universal access in infrastructure services,⁴ a requirement that is not yet met for the whole of the country. NTTA reasserts its call for both a definition of “Unserved” areas encompassing infrastructure services and a policy of ensuring a voice-dialtone safety net for Indian America, the communities most aptly called the “last-mile communities.”

NTTA notes that a policy reform providing support to Lifeline and Linkup customers for broadband services pre-supposes that appropriate infrastructure is available in rural tribal communities. However, as the Commission is aware, for at least thirty percent of households on federal reservations, this is simply untrue. Neither the FNPRM nor any of the three Draft Orders provides incentive to change the delivery of infrastructure or broadband to these last-mile communities. A broadband policy leveraging continued high-cost funding in areas where high-cost funding is currently not reaching certain communities will not change the lack of connectivity – be it basic or advanced services -- in these isolated regions.

Additionally, there is an implicit assumption that broadband service will ensure that voice dial tone will, at last, be extended to the last-mile communities. Nothing in these proposed rules provides this outcome. Expansion of broadband infrastructure does not provide reimbursement for Voice over Internet Protocol service. In addition, Internet based voice service does not have the same quality of reliability or lifeline capability as public network based voice service. In this effort to expand broadband services, the Commission will both financially dilute the funding for voice-dial tone safety net in rural America, as well as dilute the quality of lifeline services in these at-risk communities.

⁴ 47 U.S.C. 151

The Commission has historically called for unique policy treatment for Native American tribes because of historic under-service, the Federal Trust Responsibility, the Universal Service mandates of the Communications Act, and the Commission's own adopted Tribal Trust Policy. Yet, the proposed rules within the FNPRM have not paid any regard to the unique circumstances that exist on tribal lands or the failure of both market and regulatory incentives to connect tribal communities. The only substantive mention of tribal issues in the FNPRM addresses the Enhanced Lifeline and Link Up programs. Moreover, the exemptions in the proposed rules apply only to Alaska, Hawaii and Insular areas.

Imposing a cap on the high-cost fund for carriers operating in underserved or unserved areas where costs are the highest, imposes a ceiling on universal service support for areas with the greatest infrastructure need. In addition, by imposing a reverse auction mechanism, the Commission will assure that communities with the greatest need and highest costs will receive the cheapest technological solutions. Tribes hoping for parity of advanced technology will never see that parity under a reverse auction mechanism. In its attempt to reform the Universal Service rules, the Commission, with the adoption of this FNPRM and/or any of the three Draft Orders, will only further reduce market incentive to meet the needs of unserved tribal communities.

A final note of concern: The proposed rules driving Universal Service reform and broadband deployment are predicated on leveraging high-cost funding. First, nothing in the Universal Service reform proposals calls for improved connectivity to currently unserved residents. Second, all high-cost leverage is lost with regard to price-capped carriers for carrier service or broadband expansion. It is estimated that over seventy percent of federal reservation

lands are under price-capped jurisdiction. Will the proposed reforms and broadband expansion, largely focused on rate-of return carriers and the competitive ETC counterparts, help any of these tribal communities? NTTA is concerned that no regulatory incentives included in these proposals will improve access in tribal communities. In addition, under the CFR 54.305 regulations (colloquially referred to as the parent trap rule), there is no guarantee that an independent LEC purchasing a price-capped service area will be obligated to improve service or provide broadband to tribal last-mile communities.

Should the Commission take full measure to address the least-connected communities in the United States, NTTA points to thirteen specific measures that would alter the demise of Native American communities; measures presented to the Commission in April.⁵ None of these recommendations were adopted in the three Draft Orders or even discussed in the FNPRM.

III. Reforms should not be considered “Comprehensive” unless all are served.

Seventy-four years after the federal government promised “to make available, so far as possible, to *all people of the United States*, ...a rapid, efficient, Nation-wide...wire and radio communications service with adequate facilities and reasonable charges,”⁶ communications services on tribal lands lag far behind that of the rest of the country. According to the 2000 decennial census, the telephone subscribership rate of Native American households on tribal lands was 68.6 percent.⁷ The national penetration rate for the same year was 97.6 percent. The

⁵ See Attachment A, pp. 14-17.

⁶ 47 U.S.C. 151 (emphasis added).

⁷ *Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands*, United States Government Accountability Office, Report to Congressional Requesters, Telecommunications, January 2006, GAO-

thirty point gap between an average American community and an average community located on a federal reservation is more than startling; it is a national shame. On certain reservations, the situation is dire. For example, in the Navajo community, the largest tribal community in the United States, only thirty-four percent of Navajo families have access to telephone service.

This failure of regulatory policy is also reflected in advanced information and wireless voice services. Specifically, the General Accountability Office (“GAO”) reported to Congress that “[t]he status of Internet subscribership on tribal lands is *unknown* because no federal survey has been designed to track this information.”⁸ In contrast, as of December 2006, the Commission reported that more than fifty percent of U.S. households subscribed to broadband-speed Internet services.⁹ In 2006, the Commission reported 217 million wireless voice lines in 2006. However, as NTTA recently noted in comments filed with the Commission, there is very little reliable data regarding provisioning of wireless services on tribal lands.¹⁰

There are eight bright spots in what is an otherwise bleak picture of telecommunications on tribal lands. Eight tribes, out of the 563 federally-recognized tribes within the United States, have met the goal of owning their own telecommunications company, a Commission-recognized

06-189, p. 11 (“GAO Report”). Many tribal leaders dispute the data gathered by the Census Bureau as being inaccurate.

⁸ GAO Report, p. 15 (emphasis added).

⁹ *Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, Recommended Decision, FCC 07J-4, WC Docket No. 05-337, CC Docket No. 96-45 (rel. Nov. 20, 2007), para. 59 (“Joint Board Recommended Decision”).

¹⁰ *Matter of Implementation of Section 6002(b) of The Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Comments of the National Tribal Telecommunications Association, WT Docket No. 08-27, WT Docket No. 07-71 (filed Mar. 26, 2008).

sovereign right.¹¹ These eight carriers range from Cheyenne River Sioux Tribe Telephone Authority celebrating its fiftieth year of service to the Cheyenne River Sioux Tribe, to the newly-founded Hopi Telecommunications, Inc. which received its ETC designation in 2006 to serve the Hopi Tribe. The other six carriers are: Fort Mojave Telecommunications, Inc. serving the Fort Mojave Indian Tribe of Arizona, California and Nevada; Gila River Telecommunications, Inc. serving the Gila River Indian Community; Mescalero Apache Telecom, Inc. serving the Mescalero Apache Tribe; Saddleback Communications, Inc. serving the Salt River Pima - Maricopa Indian Community; San Carlos Apache Telecommunications Utility, Inc. serving the San Carlos Apache Tribe; and Tohono O'odham Utility Authority serving the Tohono O'odham Nation. All serve exclusively on their own lands, as designated by the federal government. By significantly increasing consumer access to an advanced communications network, these unique carriers demonstrate that universal service can be brought to all citizens of the country.

In this Universal Service and intercarrier compensation reform, the only substantive reference to tribes is in the context of the Enhanced Lifeline program. While NTTA applauds the Commission for its efforts to promote telephone subscribership through this program, it is unfortunate that there is nothing in the FNPRM or the three Draft Orders addressing the last-mile communities that are currently underserved or unserved. This simply furthers seventy-four years of regulatory neglect. Additionally, without explicit regulatory support or reform, 555 tribes are left to their own devices to promote their sovereign right to provide for the needs of their peoples.

¹¹ *Matter of Federal-State Joint Board on Universal Service*, Report and Order, FCC 05-46, CC Docket No. 96-45 (rel. March 17, 2005), para. 66 (emphasis added).

Neither the FNPRM nor the attached Draft Orders show any evidence that the Commission, in this proceeding, has fulfilled its part of the government-to-government relationship with tribal governments. In 2000, the Commission pledged that it would, in cooperation with tribal governments, “address communications problems, such as low penetration rates and poor quality services on reservations, and other problems of mutual concern.”¹² It specifically set a goal to “work with Indian Tribes on a *government-to-government* basis consistent with the principles of Tribal self-governance to ensure...that Indian Tribes have adequate access to communications services.”¹³ The Commission sought to achieve this goal through various principles including:

2. The Commission, in accordance with the federal government’s trust responsibility, and to the extent practicable, *will consult with Tribal governments prior to implementing any regulatory action or policy* that will significantly or uniquely affect Tribal governments, their land and resources.

3. The Commission *will strive to develop working relationships with Tribal governments*, and will endeavor to identify innovative mechanisms to facilitate Tribal consultation in agency regulatory processes that uniquely affect telecommunications compliance activities, radio spectrum policies, and other telecommunications service-related issues on Tribal lands.¹⁴

Indeed, it appears that Appendix C to the FNPRM, initially referred to as the Chairman’s draft proposal, was shown (or, at least, sufficiently revealed) to various advocacy

¹² *Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, FCC 00-207 (rel. June 23, 2000) p. 4 (“FCC Policy Statement”).

¹³ FCC Policy Statement, p. 4 (emphasis added).

¹⁴ FCC Policy Statement, p. 3 (emphasis added).

groups. Free Press, a consumer advocacy organization, states in its October 24, 2008 *ex parte* letter, that it “first outlines the Draft Proposal (*as we understand it*)...”¹⁵

However, to NTTA’s knowledge, the Commission did not consult with *any* Tribal Government while preparing the FNPRM and the Draft Orders. This lack of consultation is in direct violation of the FCC Policy Statement as a comprehensive reform of the Universal Service would certainly affect a Tribal Government, its land and resources. One affect of all three of the Draft Orders would be that the Commission could conduct reverse auctions regarding Universal Service support. Given that the areas used in the reverse auctions would physically encompass the legal lands of the tribal sovereign nations, a plain reading of the FCC Policy Statement clearly demonstrates the Commission’s contravention of its own written policy.

The overarching troubling issue is the failure to include in the proposed Draft Orders any reference to the unique circumstances of tribal sovereign nations. Both Appendices A and C would exempt ETCs serving in Alaska, Hawaii and U.S. territories and possessions from the requirements being adopted for the disbursement of high-cost support.¹⁶ The reasons given by the Commission – that the respective areas have “very different attributes and related cost issues than do the continental states”¹⁷ – are valid, both for these areas as well as for tribal lands. However, the Commission failed to include the unique circumstances of the tribal communities in the United States. Nearly 4.5 million Native Americans live in

¹⁵ See FNPRM, Appendix D, Notice of Written *Ex Parte* Presentation, Free Press, October 24, 2008 (emphasis added).

¹⁶ See FNPRM, Appendix A, para. 13 and FNPRM, Appendix C, para. 13.

¹⁷ FNPRM, Appendix A, para. 13 (footnote omitted).

isolation reinforced by incumbent carriers. If the Commission had consulted with the Tribal Governments, it would have discovered the vital need for telecommunications parity in these communities. In fact, tribal lands have far lower telephone penetration rates than either Alaska or Hawaii. A comparison of the latest census data (2000) shows that 6.3 percent of Alaskan households and 4.5 percent of Hawaiian households lack telephone service.¹⁸ As the Commission is well aware, 31.4 percent of households on federal reservation lands have no access to basic voice services. While NTTA requests that the exemption provided to Alaska, Hawaii and U.S. territories be extended to all federally-recognized tribal lands, it also asserts that if the Commission had adhered to its policy and consulted with Tribal Governments, NTTA's request would be unnecessary.

The three Draft Orders are completely lacking any acknowledgment of the status quo regarding communication services on tribal land. Indeed, all three imply that the goal of ubiquitous voice service has been achieved. However, as the evidence proves, this is simply not the case in Indian America. The current situation is unacceptable. Before moving ahead with a so-called comprehensive reform, the Commission must take all necessary steps to ensure that the promise of universal voice service is finally achieved in *all* areas of the country.

IV. Immediate action must be taken to fulfill the long-promised goal of ubiquitous voice service to Indian America.

As noted above, proposed federal Universal Service policy appears to be expanding the use of the FUSF toward providing advanced services to all parts of the country. An unwanted

¹⁸ U.S. Census Bureau Data Sets, www.factfinder.census.gov (last accessed on November 24, 2008).

result of this expansion would be focusing additional FUSF dollars on communities that have already attained 90% voice connectivity but do not have broadband. Funding broadband in a community with commercial knowledge of how to attain public funding would create an abomination of the intent of Universal Service, as expressed in the Communications Act. Therefore, the Commission should first look to serving the unserved and least served infrastructure communities in America.

A. The Commission should define “Unserved Area” for voice services.

As the Commission appears intent on including the provision of broadband service within the umbrella of universal service policy,¹⁹ it should first define the term “unserved area,” especially regarding voice services. Even within the proposed Appendices A and C, the term is used but only in the context of a commitment, or lack of, to provide broadband services.²⁰ NTTA continues to propose that, prior to defining unserved area for advanced services, the Commission immediately adopt a definition of “Unserved Area” as an area where the penetration rate for all communication services, including basic and advanced services, is fifteen percent below the nationwide average for that service.²¹ Further, in order to accurately measure the progress of Universal Service policy in the unserved areas of the country, the Commission should issue an annual report regarding Unserved Areas and the progress made, or lack thereof, toward universal service.

¹⁹ NTTA recognizes that none of the Draft Orders include “broadband Internet access service” as an FUSF supported service.

²⁰ With a minimum of thirty percent of tribal lands lacking the physical infrastructure to provide voice services, NTTA cannot understand how ETCs serving on these lands will be able to commit to provide broadband services as would be required under Appendices A and C.

²¹ See Attachment A, pp. 4-5.

B. The Communications Act and the federal trust responsibility to tribes require the adoption of a voice dial-tone safety net for tribal communities.

Tribal communities continue to be the worst-served communities in America, whether the consideration is of basic, advanced or mobile services. The Commission is required, both by the mandate contained within the Communications Act as well as the Commission-acknowledged federal trust responsibility, to make every possible effort to address the needs of tribal areas. It should address these needs before providing even more federal dollars to those communities with an abundance of services.

Due to the severe disparity of voice dial-tone access in tribal communities as compared with the national average, the Commission must apply innovative solutions to deal with the analog and digital divide in Indian America. The Commission should implement a Voice Dial-Tone Safety Net policy that would re-align its decisions on the requirements of ETCs to meet the needs of unserved tribal areas. This proposal would also give the victims of underservice a stronger participation in and use of mechanisms to drive service outcomes. Tribes that are in unserved areas should be able to, after a requisite determination that an ETC has not met the connectivity needs and outcomes in a service area, designate the new ETC to serve their land. This authority both recognizes and promotes tribal sovereignty and is in keeping with the Commission proposal to auction universal service funding for service areas.

Through the tribal dial-tone safety net proposal, 555 tribal nations will finally have the parity of service enjoyed by non-Indian communities. The Commission should mandate that all ETCs serving on tribal lands consult with the respective tribal government on plans to connect

all residents in the tribal service area. The respective tribal government should be copied on every federal filing made by an ETC serving on tribal lands. The Commission and the ETC should consult with the affected tribal government *prior* to any additional network build out or policy that affects the tribe's land and resources.

Finally, the Commission should stand ready to enforce any failure of an ETC to fully connect all geographic areas in tribal land areas, particularly when it is proved that equitable services have not been provided or there is a lack of material gains in connectivity in unserved areas. This enforcement should include making a determination regarding whether the provider has discriminated against a tribal community or not provided substantial and equitable service as compared to a non-tribal community. If such a determination is found, then the ETC should be stripped of its designation regarding the tribal land area and the tribal government should be delegated the authority to designate the next ETC to serve on the tribal lands. Again, it should be the victims of historic underservice and failed connectivity outcomes who determine which carrier should receive FUSF support to better connect residents in the tribal service area.

C. Tribal land areas must be designated as separate study areas.

NTTA urges the adoption of federally-recognized reservations as separate study areas. This regulatory assertion, based on public convenience and necessity, would simplify carrier obligations to a tribal community and streamline tribal access to telecommunications services. Moreover, this would help focus FUSF support where it is most needed. It would also clarify the authority of tribal governments over their land.

As the experiences of all eight tribally-owned carriers prove, by classifying the tribal land as a separate and unique study area, FUSF support is tightly focused on those areas that require the most funding – the unserved areas.

Certainly, if a reverse auction will determine the distribution of FUSF support, then tribal lands must be declared a separate and distinct study area. To do any less would be to erect yet one more barrier to entry for tribes seeking to provision their own communications services. Due to their nature as sovereign entities, tribes hold sovereign rights only over their own land. Therefore, a tribe seeking to self-provision communications services can do so on their own land. If the Commission insists on using the currently established incumbent service areas, then a tribal government would either be forced to provide services off of its land, and possibly submit to state regulation, or simply forgo the auction and the needed federal funds. The Commission can easily remove this barrier by establishing separate services areas on tribal lands.

In order to ensure that limited federal funds are being used first and foremost in unserved areas where the market has not worked to meet service needs, the Commission should require respective ETC(s) to file an annual compliance report with the tribal government and the Commission regarding the progress in bringing universal service in all services to the tribal land area. The annual compliance report should specifically demonstrate rates of connectivity on tribal lands. Specifically, NTTA calls on the Commission for innovative measures including incremental gains in connecting previously unconnected residential customers in unserved areas.

D. NTTA reasserts thirteen specific measures designed to address the current disparity in telecommunications services.

NTTA respectfully refers the Commission to its previously filed comments in this proceeding (“Attachment A”). NTTA outlined thirteen specific steps that could be taken to promote both universal voice service as well as aid tribal governments in achieving their sovereign right to provide for their nations. NTTA reasserts all thirteen points within these comments and respectfully requests that the Commission review these points in the current proceeding.²² Several of these points are central to the promotion of Universal Service on tribal lands. Specifically, NTTA calls on the Commission for innovative measures including:

1. Tribal land carve-out from any caps on FUSF support, permanent waiver of the parent trap rule and waiver from any reverse auction policy. These measures will enable communities in the most economically challenged and high-cost areas a hope that they, too, will be connected.
2. The FUSF’s primary mandate is to provide “voice dial-tone” connectivity for the hardest to reach market areas. The hard to reach areas are the highest-cost areas of providing service. Therefore an artificial cap on FUSF support, a reverse auction incentive to only provide the cheapest infrastructure, or severely limit spending in the highest-cost areas for tribal communities are the worst regulatory solutions imaginable.

²² NTTA again notes that none of the thirteen points or any mention of the current and severe disparity between tribal and non-tribal communities was substantively discussed in the FNPRM or the three Draft Orders.

3. NTTA has advocated self-provisioning through tribal telecom development as a key empowerment of building tribal sovereignty. NTTA asserts that the costs entailed with providing self-service to connect tribal communities, viewed from the standpoint that only one tribally-owned telecommunications company has been formed every six years since passage of the Act, and the impact on the FUSF to promote tribal self-service will be minimal.
4. NTTA's call for the Commission to define the term "Unserved Areas" as communities at least fifteen percent below the nationwide service average for service access is a crucial recognition that universal service funds need to be better directed and held more accountable. The Commission's Universal Service policy reform must prioritize funding and efforts to connect unserved communities, particularly tribal communities, as required by both the mandates of the Communications Act and under the Federal Tribal trust responsibility.
5. In assessing innovative solutions for tribal communities, the Commission needs to clarify and define its own trust responsibilities to tribal communities. Issues of tribal sovereignty, tribal authority, and tension between tribes and states must be assessed by examining how greater self-service will improve connectivity in unserved areas, and how the use of outcome predicates and metrics for universal service support might enhance efforts to serve the last mile communities. Increases in connectivity in tribal unserved areas must be measurable, proven, and sustained to receive FUSF support.

6. Focus has been directed at using “efficiency” as a predicate for allocating universal service funding. Efficiency as a criteria for eligibility as ETC carrier, at least in tribal areas, should not be predicated purely on “price”, but should include the true “build-out” costs to “connect” all geographic areas of the service area, with particular emphasis on reaching previously “unconnected” residents. An ongoing metric and outcome, as well as incremental gains in connecting previously “unserved” or “unconnected” residents must be part of the measure of efficiency and use of universal service funding. In Attachment A,²³ see the example of the Mescalero Apache community’s improvement from under 10% service penetration in 1990 to 98% connectivity in 2007 under Mescalero Apache Telecom’s enterprise, as a more significant measure of efficiency.
7. The Commission must enforce failure to fully connect all geographic areas in tribal areas, particularly when data and determination show that a carrier has failed to provide equitable service, or material incremental gains in connecting unserved areas. When a determination has been made that a provider has discriminated against a tribal community or provided substantial lack of equitable service compared to a non-tribal community, the tribe should be delegated the authority to choose or bid—by value, not price—the next provider using the tribal area high-cost support to connect and serve the tribal area.
8. There should only be one ETC in a rural area, particularly in a tribal unserved area. Competing technologies and providers vying for the same customer is inefficient use of FUSF support, increases accounting burdens on the universal service system, and lends itself

²³ Attachment A, pp. 3-4.

to the continuance of unconnected customers being bypassed for more cheaply “connected” customers.

9. Service plans in unserved tribal areas should be negotiated with the respective tribe(s). ETCs operating in unserved or historically underserved areas should be required to consult with tribes on how to improve connectivity in the tribal area and to file a plan with the Tribe and the Commission on proposed efforts. Failure to comply with its service plan, particularly coupled with failure to improve on connectivity in the tribal unserved area should result in the ETC losing the high-cost support for that tribal service area.
10. All providers should be held to the same standards of quality of service and reliability in order to attain or retain their ETC designation. In that parity of standard principle, all ETCs must demonstrate specific outcomes of connectivity and incremental gains in connecting previously unconnected residential customers in tribal unserved areas. Failure to make “incremental gains” or to demonstrate improvement in connectivity should result in the provider losing their ETC status in the tribal area.
11. The Tribe, as victim of the failure to provide fair and reasonable service, should have the delegated authority to choose or bid out its universal service provider.
12. Tribes should be given every direct assistance, resource and opportunity available through the Commission’s auspices, particularly in issuance of certificates of convenience and wireless licensing, to self-provision service.

13. An annual report regarding the state of unserved areas with a specific emphasis on unserved tribal areas should be provided to the public by the Commission.

V. The Commission must specifically consider the effect of “reform” on tribal lands.

The facts attest to a vast technological divide that exists in this country. As the Commission considers the impact of reforming federal Universal Service policy, including spending even more money on areas that are already connected to the public communications network, it must keep the other side of the divide – namely, tribal lands – at the forefront of its consideration. All efforts to “reform” Universal Service policy must be specifically considered as to their effect on tribal lands.

While NTTA recognizes that, in the FNPRM, the Commission chose not to implement the Recommended Decision issued by the Federal-State Joint Board on Universal Service (“Joint Board”)²⁴ it is possible that in future consideration of the critical issues present in this proceeding the Joint Board’s Recommended Decision will be influential. NTTA continues to assert its concerns regarding the Recommended Decision.

A. The Joint Board’s Recommended Decision would harm Universal Service on tribal lands.

Overall, the Joint Board’s Recommended Decision would harm the pursuit of Universal Service on tribal lands. This is due mainly to the false assumption that the goal of national

²⁴ FNPRM, para. 37.

Universal Service has been achieved in the area of wireline voice services. This incorrect supposition is found in the recommendation that the five elements of the federal high-cost fund be capped at their 2010 levels.²⁵ If the Commission adopts this cap, then it must exempt tribal land areas and allow such areas to receive federal Universal Service support unfettered by an artificial cap.

As noted above, telephone penetration rates on tribal lands lag thirty points behind the rest of the country. If the Commission adopts the cap without exempting tribal areas, then it is sentencing these unserved areas to a desolate future. For some areas, with a newly established ETC focused on providing service to tribal lands, 2010 levels of support will most likely be based on the costs of the previous provider. These costs are not reflective of providing service to the whole of the tribal land area and, therefore, would be inadequate to provide Universal Service. For tribes that are planning on self-provisioning service but have not yet completed the necessary regulatory process, again, 2010 levels will most likely be insufficient in the face of antiquated facilities and underserved and unserved areas. A cap on high-cost support in tribal areas, areas that are a full thirty points behind the rest of the country, does not “preserve and advance universal service.”²⁶ In the face of the circumstances present in tribal areas, the Commission must accommodate the buildout costs to the unserved areas by exempting tribal lands from a cap on federal support.

²⁵ Joint Board Recommended Decision, para. 32.

²⁶ Joint Board Recommended Decision, para. 26.

B. The Joint Board's Recommended Decision ignores the sovereignty of Tribal Governments.

The Joint Board throughout its recommendation proposes to strengthen the role of state governments in the administration and distribution of federal universal service funds. However, the Joint Board neglects to discuss tribal sovereignty and tribal authority over their land and infrastructure services. The Commission must sufficiently modify the Joint Board's Recommended Decision to preserve tribal governments' authority and the unique legal relationship between the Commission and tribal governments by excluding tribal communities from the proposed Universal Service funding policy.

The Joint Board would divide the current federal universal service high-cost fund into three separate funds: The Broadband Fund; the Mobility Fund and the Provider of Last Resort Fund.²⁷ For two of the proposed funds, the Broadband Fund and the Mobility Fund, the Joint Board recommends that states distribute the specific support amounts.²⁸ States are also tasked with determining rates of broadband and mobility access. As indicated above, it is the *tribal* land areas in this country that are vastly underserved in these two areas. Of particular significance is the fact there is no accurate data regarding the provisioning of either of these services on tribal lands. Because of the lack of clarity about the jurisdiction of states and tribal governments, as well as the lack of data about provisioning of service in tribal areas, states should not be the decision-maker on providing universal service funding to tribes.²⁹ To allow the states to wholesale administer the funds where jurisdiction is unclear would arguably signal a contrary new jurisdictional policy that was not intended and create further confusion about the

²⁷ Joint Board Recommended Decision, paras. 12-23.

²⁸ Joint Board Recommended Decision, paras 14, 17-18

jurisdictional rights of tribal governments and states. The heart of all tribal assertions of sovereignty is the separation of tribes from the jurisdictional rule or control of states. The Commission should directly administer the funds to tribes and should consult with tribal governments on the implications of the Universal Service proposals being considered by the Commission. This direct administration of funds and consultation process would strengthen the sovereign standing of tribal governments before the Commission.

Under both federal law and sovereignty principles, a tribal government has standing equal to that of a state government. The Joint Board's Recommended Decision must be modified in the following manner: Any allocated monies from either the Broadband Fund or the Mobility Fund to a state that includes federally-recognized tribal land should reflect a funding authority for tribal governments and a funding level to meet the needs of tribal build-out within that state.

Just as states are "best suited to identify unserved areas,"³⁰ tribal governments are best suited to identify the unserved and underserved areas of *their* land. Due to cultural and religious sensitivities, certain areas of a reservation may be not accessible to anyone outside the tribe. The Joint Board's recommendation of states determining the unserved areas must be modified to allow tribal governments their right and equal role. Determining unserved areas on their land is the role of the tribal government, not the state government.

²⁹ Tribes may, as sovereign entities, specifically elect to permit a state to make that determination.

³⁰ Joint Board Recommended Decision, para. 46.

C. Reverse Auctions as a Universal Service support distribution mechanism is inappropriate for tribal areas.

NTTA is very concerned that a reverse auction distribution mechanism would not provide enough network investment incentive to truly achieve the goal of universal service in unserved areas. It strongly recommends that the Commission reject reverse auctions as a Universal Service support distribution mechanism. If the Commission does adopt this questionable policy, then it should exempt tribal land areas.

Federal Universal Service policy has historically focused on improving access to telecommunications. In short, Universal Service support is provided in areas where the market would otherwise fail to provide necessary services. However, reverse auctions are not about providing comparable and substantial services but rather about providing services at the lowest cost. NTTA fears that under a reverse auction mechanism, tribal lands, many of which are unserved and expensive to serve, would continue to be neglected.

NTTA is also concerned about the investment currently in place or that is planned – investment that does provide universal service. In the realm of finite support funds, reverse auctions are unworkable because it interrupts the life-cycle of capital cost amortization. Failure to recoup costs will only discourage long-term investment in high-cost infrastructure. This effort to fund the lowest cost infrastructure will dissipate incentive to make high cost investments in unserved rural areas. Reverse auctions are also improbable as the Commission cannot force the sale or liquidation of the incumbent provider's equipment and assets. If the winning bidder in a reverse auction was not the incumbent, then the new provider would have to duplicate and

overbuild the entire network in the service area. This would result in an even higher and inefficient cost to the FUSF to replace and overbuild existing infrastructure.

Further, when considering unserved and underserved areas, the Commission should seek to measure efficiency, not by cost of deployment, but by outcomes concerning connectivity. As indicated within Attachment A, once various regulatory hurdles are removed, tribally-owned carriers such as Mescalero Apache Telecommunications, Inc. ("MATI") are often able to greatly increase the connectivity rate of previously unserved customers. In six years, MATI connected ninety-eight percent of all Mescalero residents with voice-dial tone, a 980% increase! By any measure, this end result is an efficient use of federal dollars and should continue to warrant Universal Service support.

If the Commission adopts a reverse auction policy, then it must exempt tribal lands or provide a role for the tribal government within the auction process. In extreme rural and remote areas, higher quality and reliability of service is crucial. In these areas, real cost reimbursements are crucial to accounting integrity. Because of the obligation of the federal trust responsibility to Native Americans, quality and reliability of service cannot be sacrificed for the cheapest infrastructure available.

NTTA proposes, if the Commission adopts the reverse auction mechanism and does not exempt tribal land areas, then tribal land areas be recognized as separate geographic serving areas. As noted above, this carve-out of federally-recognized reservation land would better

enable tribes seeking to self-provision communications service as well as specifically focus scarce high-cost support where it is most needed.

Under the Commission's Universal Service fund reforms and well as in NTTA's proposed Commission-delegated authority for a tribe to determine or auction —by best value, not price—Universal Service funding, the Commission should mandate that ETCs serving tribal unserved areas³¹ with specific deployment and buildout requirements are linked to service penetration levels for previously unconnected residents. Should the Commission adopt a reverse auctions policy, this requirement should be placed on the winning bidder. These buildout requirements should mandate that priority be given to unserved areas. The winning bidder should be mandated to consult with the respective tribal government regarding the proposed buildout plan and file a copy of its plan with the tribal government and the Commission. The winning bidder should also be required to file annual updates with the tribal government. If, after a reasonable period of time, such as a year, it is determined that adequate progress toward increasing connectivity on tribal lands has not been achieved, then the winning bidder should be stripped of its ETC designation. The Commission should then delegate the authority to the tribal government to determine, by competitive bid applying best value criteria, which new provider should receive Universal Service support for its lands.

³¹ NTTA again puts forth its proposed definition of "Unserved Area" as an area where the penetration rate for a communication service, including basic and advanced services, is fifteen percent below the nationwide penetration rate average for that service. See, *infra*. p. 4.

D. The Commission should remove Universal Service policy barriers hindering tribes.

NTTA directs the Commission's attention to a material barrier to tribes attempting to establish a tribally-owned telecommunications company. The "Parent Trap" rule ("Section 54.305") poses an impossible economic barrier to a tribe seeking to launch a self-sustaining tribal regulatory service. Section 54.305 was implemented by the Commission to ensure that purchasers of exchanges did not place "unreasonable reliance upon potential universal service support..."³² as a decision to start a telecom company. Under Section 54.305, a buyer inherits the regulatory status of the selling LEC. Therefore a small company (i.e., a tribal carrier) that purchases the facilities and certificate of the predecessor price-cap ILEC would not receive high-cost loop support for its investments, unless the carrier petitions the Commission for a waiver of this rule. Without going through the waiver process, generally a drawn out and expensive procedure, it is impossible for a tribally-owned carrier in a high-cost area to be able to start its own telecommunications services. If the same purchaser were to start services prior to May 1997, it would automatically be eligible to receive high-cost loop support funding from the FUSF.

To exacerbate the problem, most tribal communities are geographically remote and under the service authority of large price-cap ILECS. These service areas are served with facilities that are commonly technically exhausted and antiquated. Any small or independent purchaser would be strapped by prohibitive costs from undertaking the renovation and upgrading necessary to provide the tribal community with modern and technology competitive services.

³²*Matter of Federal-State Joint Board on Universal Service*, Report and Order, FCC 97-157, CC Docket No. 96-45, adopt. May 7, 1997, rel. May 8, 1997, para. 308.

The regulatory rationale underlying Section 54.305 – to prevent the gaming of FUSF – is simply inapplicable when a tribe seeks to self-provision telecommunications service. Clearly, the Commission never intended to harm or raise regulatory barriers for tribes by adopting Section 54.305. Indeed, the Commission routinely grants waivers of Section 54.305 to carriers serving tribal communities. However, as long as this provision stands as applicable to all providers, it sends a very discouraging message to tribes and is at odds with the Commission's efforts supporting tribes' efforts to provide service to its community. In order to advance universal service to unserved areas, the Commission must exempt tribal service areas from coverage of Section 54.305. Access to high-cost loop support, otherwise permissible, is the key to survival as a rural ETC.

VI. The Commission should take all necessary steps in pursuit of true Universal Service.

As noted by Commissioner Michael Copps, "Universal Service is a critical pillar of the Telecommunications Act of 1996."³³ While the Commission through this proceeding proposes to build upon that ideal, for many residents on tribal lands, the pillar of universal service seems more like a plant stand. However, the Commission can take steps in this proceeding to advance universal service "to all Americans, no matter who they are or where they live."³⁴ The Commission's "choices in this proceeding will have a dramatic effect on the ability of communities and consumers in Rural America to thrive and grow..."³⁵ The Commission should

³³ Joint Board Recommended Decision, Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part.

³⁴ *Ibid.*

³⁵ Joint Board Recommended Decision, Statement of Commissioner Jonathan S. Adelstein, Approving in FCC 08-22, Approving in FCC 08-4, Concurring in Part, Dissenting in Part in FCC 08-05.

sincerely examine the effect that past choices in Universal Service policy have had on Indian America while determining how the future will affect this part of our country. Bringing true universal service to high-cost areas takes time, money and, most importantly, a diligent pursuit of a policy to benefit the whole of the country. As the past seventy-four years have proven, universal service is a policy that provides excellent returns.

NTTA proposes that the Commission embrace the opportunity before it to address the mandate by the Communications Act that all Americans are connected to a communications network.

VII. NTTA's Recommended Actions

It is imperative that as the Commission deliberates changes in the Universal Service fund, it fully considers the fact that thirty percent of Americans living on tribal lands *still do not* have access to telecommunications. Assumptions that the infrastructure deployment for POLRs is complete and no longer needed are premature. NTTA submits that the FNPRM and the three Draft Orders will not bring a substantial regulatory solution to “unserved” areas; areas that should be deemed the highest priority of any universal service program. Increased broadband services will not assure a voice-dialtone safety net for tribal communities either in quantity of coverage or, more importantly, in quality of critical, lifeline service.

NTTA therefore respectfully requests that the Commission postpone a vote on these proposed rules until it fully addresses key access and connectivity barriers for rural and tribal communities. True universal service reform should embrace innovative change and market

incentive to connect tribal communities and provide technology options in parity with non-tribal communities.

Should the Commission adopt Universal Service reform without appropriate consideration of the unserved areas, then NTTA strongly urges the Commission exempt tribal communities from funding caps, reverse auction processes, and other measures that would diminish funding and options for tribal market solutions. The Commission should provide tribal consumers the option of deciding its provider to receive the area's cost support, including an option to provide its own service solutions.

Should the Commission impose universal service coverage for broadband services, then NTTA strongly urges the Commission prioritize funding for communities without both broadband and voice-dialtone service and defined these areas as "unserved" areas or "underserved areas." The areas with the least should be the first to receive support under any new or reformed distribution mechanism.

With the appropriate regulatory policies, the Commission should be able to refine measures that honor and uphold the universal service mandate to give all Americans equal access to telecommunications service.

Respectfully submitted,

By: [electronically filed]
Jose Matanane, Acting President
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November 26, 2008

Attachment A

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
)	
Federal-State Joint Board on Universal Service	)	CC Docket 96-45
)	

Comments of the National Tribal Telecommunications Association

I. Introduction

The National Tribal Telecommunications Association (“NTTA”) hereby submits these comments in response to the Notices of Proposed Rulemaking (“NPRMs”) captioned above. NTTA is a national trade association representing tribally owned telecommunications companies and their customers. NTTA members serve and are a part of their respective tribal communities. These comments address the concerns of NTTA.

Within three NPRMs, the Commission outlines broad potential reforms to the federal universal service support fund (“FUSF”). As both Eligible Telecommunications Carriers (“ETCs”) and Providers of Last Resort (“POLRs”), NTTA members understand the economic and political pressures currently building on the FUSF and applaud the Commission’s intent to relieve these pressures. However, NTTA urges the Commission to ensure that the original goals of universal service policy are fulfilled for *all* areas of the country prior to pursuing additional goals. Further, the Commission needs recommit itself to its policy of a government-to-government relationship with tribal governments and ensure that tribal governments have equal opportunities to those available to any other governing authority. Specifically, NTTA proposes 1) the Commission adopt a definition of unserved areas; 2) recognize the authority of tribal governments regarding the use of FUSF funds on tribal lands; and 3) designate tribal lands as separate study areas.

II. Federal universal service policy has failed tribal land residents.

Seventy-four years after the federal government promised “to make available, so far as possible, to *all people of the United States*, ...a rapid, efficient, Nation-wide...wire and radio communications service with adequate facilities and reasonable charges,”¹ communications services on tribal lands lag far behind that of the rest of the country. According to the 2000 decennial census, the telephone subscribership rate of Native American households on tribal lands was 68.6 percent.² The national penetration rate for the same year was 97.6 percent. The 29 point gap between an average American community and an average community located on a federal reservation is more than startling; it is shameful. This failure only increases when considering advanced information and wireless voice services. Specifically, the General Accountability Office (“GAO”) recently reported to Congress that “[t]he status of Internet subscribership on tribal lands is *unknown* because no federal survey has been designed to track this information.”³ In contrast, as of December 2006, the Commission reported that more than fifty percent of U.S. households subscribed to broadband-speed Internet services.⁴ In 2006, the Commission reported 217 million wireless voice lines in 2006. However, as NTTA recently noted in comments filed with the Commission, there is very little, if any, reliable data regarding provisioning of wireless services on tribal lands.⁵

The Commission’s response to this failure to adhere to the mandate of the Communications Act has been mixed at best. In 2000, the Commission pledged that it would, in cooperation with tribal governments, “address communications problems, such as low penetration rates and poor quality services on reservations, and other problems of mutual

¹ 47 U.S.C. 151 (emphasis added).

² *Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands*, United States Government Accountability Office, Report to Congressional Requesters, Telecommunications, January 2006, GAO-06-189, p. 11 (“GAO Report”). Many tribal leaders dispute the data gathered by the Census Bureau as being inaccurate.

³ GAO Report, p. 15 (emphasis added).

⁴ *Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, Recommended Decision, FCC 07J-4, WC Docket No. 05-337, CC Docket No. 96-45 (rel. Nov. 20, 2007), para. 59 (“Joint Board Recommended Decision”).

⁵ *Matter of Implementation of Section 6002(b) of The Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Comments of the National Tribal Telecommunications Association, WT Docket No. 08-27, WT Docket No. 07-71 (filed Mar. 26, 2008).

concern.”⁶ It specifically set a goal to “work with Indian Tribes on a *government-to-government* basis consistent with the principles of Tribal self-governance to ensure, through its regulations and policy initiatives, and consistent with Section 1 of the Communications Act of 1934, that Indian Tribes have adequate access to communications services.”⁷ However, the Commission has implemented very little direct action focused on bridging the large divide between tribal areas and the rest of the country.

There are eight bright spots in what is an otherwise bleak picture of telecommunications in tribal land areas. Eight tribes, out of the 563 tribes within the United States, have met the goal of owning their own telecommunications company, a Commission-recognized *sovereign* right.⁸ These eight carriers range from Cheyenne River Sioux Tribe Telephone Authority celebrating its fiftieth year of service to the Cheyenne River Sioux Tribe, to the newly-founded Hopi Telecommunications, Inc. which received its ETC designation in 2006 to serve the Hopi Tribe. The other six carriers are: Fort Mojave Telecommunications, Inc. serving the Fort Mojave Indian Tribe of Arizona, California and Nevada; Gila River Telecommunications, Inc. serving the Gila River Indian Community; Mescalero Apache Telecom, Inc. serving the Mescalero Apache Tribe; Saddleback Communications, Inc. serving the Salt River Pima -Maricopa Indian Community; San Carlos Apache Telecommunications Utility, Inc. serving the San Carlos Apache Tribe; and Tohono O'odham Utility Authority serving the Tohono O'odham Nation. All serve exclusively on their own lands, as designated by the federal government. By significantly increasing consumer access to an advanced communications network, these unique carriers demonstrate that universal service can be brought to all citizens of the country.

While all eight tribally-own carriers have dramatically improved telecommunication services to their respective communities, Mescalero Apache Telecom, Inc. (“MATI”) example is particularly striking regarding how, through tribal direction and focus, universal service can be achieved in unserved areas at an astounding pace. In 1990, the Mescalero Apache Reservation had a telephone penetration rate of under ten percent. The tribal lands were part of a much

⁶ *Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, FCC 00-207 (rel. June 23, 2000) p. 4 (“FCC Policy Statement”).

⁷ FCC Policy Statement, p. 4 (emphasis added).

larger serving area of a non-tribally owned carrier. MATI had its tribal lands established as its study area by the Commission in 2001.⁹ By 2007, only six years later, MATI had increased the telephone penetration rate within its study area to *ninety-eight percent*.

Throughout the three NPRMs at issue here, as well as in the universal service docket, the Commission has implied that the goal of universal voice service, first set by Congress in 1934 and later affirmed in 1996, has been achieved. However, as the evidence proves the policy of universal service, as currently implemented by the Commission, has utterly failed in Indian Country. While thirty percent of the residents of tribal lands wait for simple dial tone, the Commission is preparing to provide broadband and mobile services to those who already enjoy universal service. The current situation is unacceptable and the Commission must take all necessary steps to ensure that the promise of universal service is finally achieved in *all* areas of the country.

III. Immediate action must be taken.

As noted above, federal universal service policy appears to be speeding toward providing advanced services to parts of the country that already have ubiquitous voice service. However, *prior* to spending scarce federal funds on those who have the most, the Commission should first look to serving the least served, indeed, the unserved communities in America.

A. The Commission should define “Unserved Area.”

The Commission should first define the term “unserved area.” While this term is often used in the universal service reform debate, it has no statutory or regulatory definition. Therefore, while much lip service is paid to bringing communication services to all areas of the country, little action results and some areas continue to be left far behind. NTTA proposes that the Commission immediately adopt a definition of “unserved area” as an area where the penetration rate for a communication service, including basic and advanced services, is fifteen

⁸ *Matter of Federal-State Joint Board on Universal Service*, Report and Order, FCC 05-46, CC Docket No. 96-45 (rel. March 17, 2005), para. 66 (emphasis added).

⁹ *Matter of Mescalero Apache Telecom, Inc., GTE Southwest, Inc. and Valor Telecommunications of New Mexico, LLC, Joint Petition for Waiver of Definition of Study Area Contained in Part 36, Appendix-Glossary of the Commission’s Rules, Mescalero Apache Telecom, Inc. Waiver of Sections 61.41(c)(2), 69.3(e)(11), 36.611, and 36.612 of the Commission’s Rules*, Order, 16 FCC Rcd 3813, 3816 (2001).

percent below the nationwide average for that service. Further, in order to accurately measure the progress of universal service policy in the unserved areas of the country, the Commission should issue an annual report regarding unserved areas and the progress made, or lack thereof, toward universal service.

B. The Communications Act and the federal trust responsibility to tribes require the adoption of a voice dial-tone safety net for tribal communities.

Tribal communities are the worst-served communities in America. Therefore, the Commission must make every possible effort to address the needs of tribal areas. Due to the lack of adequate service in tribal communities, a greater effort partnering with tribal governments is required to solve market and economic barriers to telecommunications access. Sovereignty of tribes must also be accorded in this regulatory policy process. The Commission has given nodding recognition to this imperative with its trust policy guidance to consult “with Tribal governments *prior to implementing any regulatory action or policy* that will significantly or uniquely affect Tribal governments, their land and resources.”¹⁰ However, very little direct action has been taken to implement this consultative process. Seven Indian Telecom Initiative forums have been held to deliver information to tribes. However, those meetings generally have not been conducive to listening to tribal proposed solutions or to working with tribes to create solutions improve access to telecommunications. Further, two of these meetings focused on broadcast issues and one on homeland security efforts.

Twelve years after the passage of the 1996 Telecommunications Act (the “Act”), a law intended to enhance telecommunications access for American communities, only two Indian Tribes have become their own service providers, the Mescalero Apache Tribe and the Hopi Tribe. This represents a self-provisioning gain of one tribal enterprise every six years since passage of the Act. While becoming a tribal telecommunications provider is not the sole venue to increase service penetration in isolated rural communities, the seven self-provisioning tribes¹¹ have shown a profound achievement rate of improving connectivity for previously unconnected

¹⁰ FCC Policy Statement, p. 4 (emphasis added).

¹¹ Hopi Telecommunications, Inc. began providing service in July 2007.

customers. As noted *infra*, several of these communities have made 980 percent gains in improving connectivity for their native communities.

Due to the severe disparity of voice dial-tone access in tribal communities as compared with the national average, the Commission must apply innovative solutions to deal with the analog and digital divide in Indian America. The Commission should declare a Voice Dial-tone Safety Net that would re-align its decisions on the requirements of ETCs to meet the needs of unserved tribal areas. This proposal would also give the victims of underservice a stronger participation in and use of mechanisms to drive service outcomes. Tribes that are in unserved areas should be able to, after a requisite determination that an ETC has not met the connectivity needs and outcomes in a service area, designate the new ETC to serve their land. This authority both recognizes and promotes tribal sovereignty and is in keeping with Commission proposal to auction universal service funding for service areas.

Through the tribal dial-tone safety net proposal, 555 tribal nations will finally have the parity of service as non-Indian communities. In unserved tribal communities, the Commission should mandate that all ETCs serving on tribal lands consult with the respective tribal government on plans to connect all residents in the tribal service area. In addition, as a practice, the Commission should ensure that limited federal funds are being used first and foremost in unserved areas where the market has not worked to meet service needs. After applying new outcome performance measures to connect unserved areas, the Commission should require the respective ETC(s) to file an annual compliance report with the tribal government and the Commission regarding the progress in bringing universal service to the tribal land area. The annual compliance report should specifically demonstrate rates of connectivity on tribal lands, including incremental gains in connecting previously unconnected residential customers in unserved areas.

Finally, the Commission should stand ready to enforce any failure of an ETC to fully connect all geographic areas in tribal land areas, particularly when it is proved that equitable services have not been provided or there is a lack of material gains in connectivity in unserved areas. This enforcement should include making a determination regarding whether the provider

has discriminated against a tribal community or not provided substantial and equitable service as compared to a non-tribal community. If such a determination is found, then the ETC should be stripped of its designation regarding the tribal land area and the tribal government should be delegated the authority to designate the next ETC to serve on the tribal lands. Again, it should be the victims of historic underservice and failed connectivity outcomes who determine which carrier should receive FUSF support to better connect residents in the tribal service area.

C. Tribal land areas must be designated as separate study areas.

The Commission should immediately declare all federally-recognized reservations as separate study areas. This declaration would greatly aid the policy of universal service by specifically focusing FUSF support where it is most needed. It would also clarify the authority of tribal governments over their land.

As the experiences of all eight tribally-owned carriers prove, by classifying the tribal land as a separate and unique study area, FUSF support is tightly focused on those areas that require the most funding – the unserved areas. As noted above, MATI was able to increase telephone penetration rates by 87 percentage points after the tribal land it serves was removed from a much larger service area. Another telling example is that of Fort Mojave Telecommunications, Inc. (“FMTI”), the tribally-owned carrier of Fort Mojave Indian Tribe of Arizona, California and Nevada. Prior to the establishment of FMTI, the penetration rate of the tribal land stood at 35 percent. FMTI began providing service in 1992 solely on its tribal land and, by 2003, had increased telephone penetration rates to 98 percent.¹² As the Tribe’s name indicates, tribal land reaches into three states and, prior to FMTI, was served by at least two separate carriers. It was only after one study area encompassing the whole of tribal land that penetration rates drastically increased. The Commission should look to the examples of MATI, FMTI and the other tribally-owned carriers as it seeks to complete the first goal of federal universal service policy – the provisioning of voice services to all Americans.

¹² Testimony of Nora McDowell, Tribal Chairperson, Fort Mojave Indian Tribe, given before the United States Senate, Committee on Indian Affairs, *The Status of Telecommunications In Indian Country*, May 22, 2003.

IV. The Commission must specifically consider the effect of “reform” on tribal lands.

The facts attest to a vast technological divide that exists in this country. As the Commission considers the impact of reforming federal universal service policy, including spending even more money on areas that are already connected to the public communications network, it must keep the other side of the divide – namely, tribal lands – at the forefront of its consideration. All efforts to “reform” universal service policy must be specifically considered as to their effect on tribal lands.

A. The Joint Board’s Recommended Decision would harm universal service in tribal lands.

Overall, the Joint Board’s Recommended Decision would harm the pursuit of universal service on tribal lands. This is due mainly to the false assumption that the goal of national universal service has been achieved in the area of wireline voice services. This incorrect supposition is found in the recommendation that the five elements of the federal high-cost fund be capped at their 2007 levels.¹³ If the Commission adopts this cap, then it must exempt tribal land areas and allow such areas to receive FUSF support unfettered by an artificial cap.

As noted above, telephone penetration rates on tribal lands lag thirty points behind the rest of the country. If the Commission adopts the cap without exempting tribal areas, then it is sentencing these unserved areas to a desolate future. For some areas, with a newly established ETC focused on providing service to tribal lands, 2007 levels of support will most likely be based on the costs of the previous provider. These costs are not reflective of providing service to the whole of the tribal land area and, therefore, would be inadequate to provide universal service. For tribes that are planning on self-provisioning service but have not yet completed the necessary regulatory process, again, 2007 levels will most likely be insufficient in the face of antiquated facilities and underserved and unserved areas. A cap on high-cost support in tribal areas, areas that are a full thirty points behind the rest of the country, does not “preserve and advance universal service.”¹⁴ In the face of the circumstances present in tribal areas, the Commission

¹³ Joint Board Recommended Decision, para. 32.

¹⁴ Joint Board Recommended Decision, para. 26.

must accommodate the buildout costs to the unserved areas by exempting tribal lands from a cap on FUSF.

B. The Joint Board's Recommended Decision ignores the sovereignty of Tribal Governments.

The Joint Board throughout its recommendation proposes to strengthen the role of state governments in the administration and distribution of federal universal service funds. However, the Joint Board neglects to discuss tribal sovereignty and tribal authority over their land and infrastructure services. The Commission must sufficiently modify the Joint Board's Recommended Decision to preserve tribal governments' authority and the unique legal relationship between the Commission and tribal governments by excluding tribal communities from the proposed universal service funding policy.

The Joint Board would divide the current federal universal service high-cost fund into three separate funds: The Broadband Fund; the Mobility Fund and the Provider of Last Resort Fund.¹⁵ For two of the proposed funds, the Broadband Fund and the Mobility Fund, the Joint Board recommends that states distribute the specific support amounts.¹⁶ States are also tasked with determining rates of broadband and mobility access. As indicated above, it is the *tribal* land areas in this country that are vastly underserved in these two areas. Of particular significance is the fact there is no accurate data regarding the provisioning of either of these services on tribal lands. Because of the lack of clarity about the jurisdiction of states and tribal governments, as well as the lack of data about provisioning of service in tribal areas, states should not be the decision-maker on providing universal service funding to tribes.¹⁷ To allow the states to wholesale administer the funds where jurisdiction is unclear would arguably signal a contrary new jurisdictional policy that was not intended and create further confusion about the jurisdictional rights of tribal governments and states. The Commission should directly administer the funds to tribes and should consult with the tribal governments on the implications of universal service proposals being considered by the Commission. This direct administration of

¹⁵ Joint Board Recommended Decision, paras. 12-23.

¹⁶ Joint Board Recommended Decision, paras 14, 17-18

¹⁷ Tribes may, as sovereign entities, specifically elect to permit a state to make that determination.

funds and consultation process would strengthen the sovereign standing of tribal governments before the FCC.

Under both federal law and sovereignty principles, a tribal government has standing equal to that of a state government. The Joint Board's Recommended Decision must be modified in the following manner: Any allocated monies from either the Broadband Fund or the Mobility Fund to a state that includes federally-recognized tribal land should reflect a funding authority for tribal governments and a funding level to meet the needs of tribal build-out within that state.

Just as states are "best suited to identify unserved areas,"¹⁸ tribal governments are best suited to identify the unserved and underserved areas of *their* land. Due to cultural and religious sensitivities, certain areas of a reservation may be not accessible to anyone outside the tribe. The Joint Board's recommendation of states determining the unserved areas must be modified and allow tribal governments their equal role. Determining unserved areas on their land is the role of the tribal government, not the state government.

C. Reverse Auctions as an FUSF distribution mechanism is inappropriate for tribal areas.

One of the NPRMs being considered in the instant proceeding seeks comment on the use of reverse auctions as a FUSF distribution mechanism. NTTA is concerned that a reverse auction would not provide enough network investment incentive to truly achieve the goal of universal service in unserved areas. It strongly recommends that the Commission reject reverse auctions as an FUSF distribution mechanism. If the Commission does adopt this questionable policy, then it should exempt tribal land areas.

Federal universal service policy has historically focused on improving access to telecommunications. In short, FUSF support is provided in areas where the market would otherwise fail to provide necessary services. However, reverse auctions are not about providing comparable and substantial services but rather about providing services at the lowest cost.

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NTTA fears that under a reverse auction mechanism, tribal lands, many of which are unserved and expensive to serve, would continue to be neglected.

NTTA is also concerned about the investment currently in place or that is planned – investment that does provide universal service. In the realm of finite support funds, reverse auctions are unworkable because it interrupts the life-cycle of capital cost amortization. Failure to recoup costs will only discourage long-term investment in high-cost infrastructure. This effort to fund the lowest cost infrastructure will dissipate incentive to make high cost investments in unserved rural areas. Reverse auctions are also improbable as the Commission cannot force the sale or liquidation of the incumbent provider's equipment and assets. If the winning bidder in a reverse auction was not the incumbent, then the new provider would have to duplicate and overbuild the entire network in the service area. This would result in an even higher and inefficient cost to the FUSF to replace and overbuild existing infrastructure.

Further, when considering unserved and underserved areas, the Commission should seek to measure efficiency, not by cost of deployment, but by outcomes concerning connectivity. As indicated above, once various regulatory hurdles were removed, tribally-owned carriers such as MATI and FMTI were able to greatly increase the connectivity rate of previously unserved customers. In six years, MATI connected 98 percent of all Mescalero residents with voice-dial tone, a 980% increase! By any measure, this end result is an efficient use of federal dollars and should continue to warrant universal service support.

If the Commission adopts a reverse auction policy, then it must exempt tribal lands or provide a role for the tribal government within the auction process. In extreme rural areas higher quality and reliability of service is crucial. In these areas, real cost reimbursements are crucial to accounting integrity. Because of the obligation of the federal trust responsibility to Native Americans, quality and reliability of service cannot be sacrificed for the cheapest infrastructure available.

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areas. As noted above, this carve-out of federally-recognized reservation land would better enable tribes seeking to self-provision communications service as well as specifically focus scarce high-cost support where it is most needed.

Under the Commission's universal service fund reforms and well as in NTTA's proposed Commission-delegated authority for a tribe to determine or auction —by best value, not price— universal service funding, the Commission should mandate that ETCs serving tribal unserved areas¹⁹ with specific deployment and buildout requirements are linked to service penetration levels for previously unconnected residents. Should the Commission adopt a reverse auctions policy, this requirement should be placed on the winning bidder. These buildout requirements should mandate that priority be given to unserved areas. The winning bidder should be mandated to consult with the respective tribal government regarding the proposed buildout plan and file a copy of its plan with the tribal government and the Commission. The winning bidder should also be required to file annual updates with the tribal government. If, after a reasonable period of time, such as a year, it is determined that adequate progress toward increasing connectivity on tribal lands has not been achieved, then the winning bidder should be stripped of its ETC designation. The Commission should then delegate the authority to the tribal government to determine, by competitive bid applying best value criteria, which new provider should receive FUSF support for its lands.

D. The Commission should remove universal service policy barriers hindering tribes.

NTTA directs the Commission's attention to a material barrier to tribes attempting to establish a tribally-owned telecommunications company. Referred to as the "Parent Trap" rule, Section 54.305 poses an impossible economic barrier to a tribe seeking to launch a self-

¹⁹ NTTA again puts forth its proposed definition of "Unserved Area" as an area where the penetration rate for a communication service, including basic and advanced services, is fifteen percent below the nationwide penetration rate average for that service. See, *infra*. p. 4.

sustaining tribal regulatory service. Section 54.305 was implemented by the Commission to ensure that purchasers of exchanges did not place “unreasonable reliance upon potential universal service support...”²⁰ as a decision to start a telecom company. Under Section 54.305 a buyer inherits the regulatory status of the selling LEC. Therefore a small company (a tribal carrier) that purchases the facility and certificate of the predecessor price-cap ILEC would most likely not receive high-cost loop support for its investments. This makes it impossible for a tribally-owned carrier in a high-cost area to be able to start its own telecommunications services. If the same purchaser were to start services prior to May 1997, it would automatically be eligible to receive high-cost loop support funding from the USF.

To exacerbate the problem, most tribal communities are geographically remote and under the service authority of large price-cap ILECS. These service areas are served with facilities that are generally technically exhausted and antiquated. Any small or independent purchaser would be strapped by prohibitive costs from undertaking the renovation and upgrading necessary to provide the tribal community with modern and technology competitive services.

The regulatory rationale underlying Section 54.305 – to prevent the gaming of federal USF – is simply inapplicable when a tribe seeks to self-provision telecommunications service. Clearly, the Commission never intended to harm or raise regulatory barriers for tribes by adopting Section 54.305. Indeed, the Commission has recently granted waiver of Section 54.305 to carriers serving tribal communities. However, as long as this provision stands as applicable to all providers, it sends a very discouraging message to tribes and is at odds with the Commission’s efforts supporting tribes’ efforts to provide service to its community. In order to advance universal service to unserved areas, the Commission must exempt tribal service areas from coverage of Section 54.305.

²⁰*Matter of Federal-State Joint Board on Universal Service*, Report and Order, FCC 97-157, CC Docket No. 96-45, adopt. May 7, 1997, rel. May 8, 1997, para. 308.

V. The Commission should take all necessary steps in pursuit of universal service.

As noted by Commissioner Michael Copps, “Universal Service is a critical pillar of the Telecommunications Act of 1996.”²¹ While the Commission through this proceeding proposes to build upon that ideal, for many residents on tribal lands, the pillar of universal service seems more like a plant stand. However, the Commission can take steps in this proceeding to advance universal service “to all Americans, no matter who they are or where they live.”²² The Commission’s “choices in this proceeding will have a dramatic effect on the ability of communities and consumers in Rural America to thrive and grow...”²³ The Commission should sincerely examine the effect that past choices in universal service policy have had on Indian Country while determining how the future will affect this part of our country. Bringing true universal service to high-cost areas takes time, money and, most importantly, a diligent pursuit of a policy to benefit the whole of the country. As the past seventy-four years have proven, universal service is a policy that provides excellent returns.

In summary, NTTA proposes that the Commission embrace the opportunity before it to address the mandate by the Act that all Americans are connected to a communications network. Specifically, NTTA calls on the Commission for innovative measures including:

1. Tribal land carve-out from any caps on FUSF support, permanent waiver of the parent trap rule and waiver from any reverse auction policy. These measures will enable communities in the most economically challenged and high-cost areas a hope that they, too, will be connected.
2. The Universal Service Fund’s primary mandate is to provide “voice dial-tone” connectivity for the hardest to reach market areas. The hard to reach areas are the highest-cost areas of providing service. Therefore an artificial cap on FUSF support, a

²¹ Joint Board Recommended Decision, Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part.

²² *Ibid.*

²³ Joint Board Recommended Decision, Statement of Commissioner Jonathan S. Adelstein, Approving in FCC 08-22, Approving in FCC 08-4, Concurring in Part, Dissenting in Part in FCC 08-05.

reverse auction incentive to only provide the cheapest infrastructure, or severely limit spending in the highest-cost areas for tribal communities are the worst regulatory solutions imaginable.

3. NTTA has advocated self-provisioning through tribal telecom development as a key empowerment of building tribal sovereignty. NTTA asserts that the costs entailed with providing self-service to connect tribal communities, viewed from the standpoint that only one tribally-owned telecommunications company has been formed every six years since passage of the Act, and the impact on the Universal Service Fund to promote tribal self-service will be minimal.
4. NTTA's call for the Commission to define the term "unserved areas" as communities at least fifteen percent below the nationwide service average for service access is a crucial recognition that universal service funds need to be better directed and held more accountable. The Commission's universal service policy reform must prioritize funding and efforts to connect unserved communities, particularly tribal communities as required by both the mandates of the Communications Act and as required under the Federal Tribal trust responsibility.
5. In assessing innovative solutions for tribal communities, the Commission needs to clarify and define its trust responsibilities to tribal communities. Issues of tribal sovereignty, tribal authority, and tension between tribes and states must be assessed by examining how greater self-service may improve connectivity in unserved areas, and how the use of outcome predicates and metrics for universal service support might enhance efforts to serve "the last mile" communities. Increases in connectivity in tribal unserved areas must be measurable, proven, and sustained to receive FUSF support.
6. Focus has been directed at using "efficiency" as a predicate for allocating universal service funding. Efficiency as a criteria for eligibility as ETC carrier, at least in tribal areas, should not be predicated purely on "price", but should include the true "build-out" costs to "connect" all geographic areas of the service area, with particular emphasis on

reaching previously “unconnected” residents. An ongoing metric and outcome, as well as incremental gains in connecting previously “unserved” or “unconnected” residents must be part of the measure of efficiency and use of universal service funding. See the example of the Mescalero Apache community’s improvement from under 10% service penetration in 1990 to 98% connectivity in 2007 under Mescalero Apache Telecom’s enterprise, as a more significant measure of efficiency.

7. The Commission must enforce failure to fully connect all geographic areas in tribal areas, particularly when data and determination show that a carrier has failed to provide equitable service, or material incremental gains in connecting unserved areas. When a determination has been made that a provider has discriminated against a tribal community or provided substantial lack of equitable service compared to a non-tribal community, the tribe should be delegated the authority to choose or bid—by value, not price—the next provider using the tribal area high-cost support to connect and serve the tribal area.
8. There should only be one ETC in a rural area, particularly in a tribal unserved area. Competing technologies and providers vying for the same customer is inefficient use of FUSF support, increases accounting burdens on the universal service system, and lends itself to the continuance of unconnected customers being bypassed for more cheaply “connected” customers.
9. Service plans in unserved tribal areas should be negotiated with the respective tribe(s). ETCs operating in unserved or historically underserved areas should be required to consult with tribes on how to improve connectivity in the tribal area and to file a plan with the Tribe and the Commission on proposed efforts. Failure to comply with its service plan, particularly coupled with failure to improve on connectivity in the tribal unserved area should result in the ETC losing the high-cost support for that tribal service area.
10. All providers should be held to the same standards of quality of service and reliability in order to attain or retain their ETC designation. In that parity of standard principle, all

ETCs must demonstrate specific outcomes of connectivity and incremental gains in connecting previously unconnected residential customers in tribal unserved areas. Failure to make “incremental gains” or to demonstrate improvement in connectivity should result in the provider losing their ETC status in the tribal area.

11. The Tribe, as victim of the failure to provide fair and reasonable service, should have the delegated authority to choose or bid out its universal service provider.
12. Tribes should be given every direct assistance, resource and opportunity available through the Commission’s auspices, particularly in issuance of certificates of convenience and wireless licensing, to self-provision service.
13. An annual report regarding the state of unserved areas with a specific emphasis on unserved tribal areas should be provided to the public by the Commission.

While the Commission considers the breadth of public comment, facts and figures a proceeding of this magnitude will generate, NTTA respectfully requests that one fact remain prominent: Twenty-nine percent of the people of the United States living on tribal lands do *not* have access to telecommunications and information services comparable to those in urban areas. It is far past the time for that fact to remain true.

Respectfully submitted,

By: [electronically filed]
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